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No. 83-276

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

SELECTIVE SERVICE SYSTEM, ET AL.,
Appellants,

vs.

MINNESOTA PUBLIC INTEREST RESEARCH GROUP and JOHN DOE, PAUL POE, and RICHARD ROE,
Appellees.

SELECTIVE SERVICE SYSTEM, ET AL.,
Appellants,

vs.

BRADLEY BOE, CARL COE, and FRANK FOE,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA

BRIEF FOR THE APPELLEES

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QUESTIONS PRESENTED

1. Whether Section 1113 of the Department of Defense Authorization Act of 1983—which punishes without trial men who have not registered in compliance with the Military Selective Service Act by denying them all forms of financial assistance under Title IV of the Higher Education Act of 1965—is a bill of attainder.

2. Whether Section 1113—which requires applicants for Title IV assistance to state whether they have complied with the registration requirements of the Military Selective Service Act—violates the Fifth Amendment's protection against compelled self-incrimination.

3. Whether Section 1113—which seeks to enforce the registration requirements of Military Selective Service Act only against nonregistrants who are in need of financial assistance—denies equal protection under the law as guaranteed by the Fifth Amendment.

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA

BRIEF FOR THE APPELLEES

STATEMENT

This is a direct appeal from the final judgment and decree entered on June 16, 1983, by the United States District Court for the District of Minnesota, declaring Sec-

tion 1113 of the Department of Defense Authorization Act of 1983 unconstitutional and enjoining its enforcement. Appellees generally accept appellants' version of the procedural history of the case presented in their Brief at 4-9. However, appellees take exception to appellants' analysis and characterization of the legislative history of Section 1113.

Section 1113 was never considered by any committee in either the House or Senate, which qualifies the impression created in appellants' statement that Section 1113 was carefully considered before passage. Moreover, as will be discussed further *infra*, the legislative record demonstrates that Congress enacted Section 1113 to punish those who have not registered with the Selective Service System. Supporters of Section 1113 emphasized again and again their displeasure with those young men who had violated the "law of the land" by not registering.

Additionally, appellees note that none of the operative facts set forth in their complaints have changed. Each of them is a male Minnesota resident who wishes to further his post-secondary education but who needs financial aid. The careeer plans of each require a college degree. Each of them has made a conscientious decision not to comply with the registration requirements of the Military Selective Service Act. None is currently receiving any form of federal financial assistance.

Section 1113, which limits benefits provided by Title IV of the Higher Education Act of 1965, 20 U.S.C. § 1001 *et seq.*, is inconsistent with the purposes of that Act. The increasing costs of post-secondary education and growing numbers of academically qualified students who could not afford it, with the consequent loss to the United States of potentially productive highly trained members of society

and impairment of its academic institutions, led to the passage of the Higher Education Act.[1]

Under the Act students who are to receive federal aid are not to be designated or selected in any way by the United States, except as provided by definitions with respect to financial need. Higher Education Act of 1965 § 484, as added by Pub. L. No. 96-374 [94 Stat. 1448 (1980)], 20 U.S.C. 1091. *See, e.g.*, H. R. Rep. No. 96-520, 96th Cong., 2d Sess., *reprinted in* 1980 U.S. Code Cong. & Ad. News 3182. Furthermore, Congress decided "that colleges and universities must continue to exercise the crucial judgments not only as to which students are to be selected for grants, but also how financial support will be reported." S. Rep. No. 673, 89th Cong., 1st Sess., *reprinted in* 1965 U.S. Code Cong. & Ad. News 4056.

SUMMARY OF ARGUMENT

I. Section 1113 is a bill of attainder. U.S. Const. art. I, §9, cl. 3. A statute is an unconstitutional bill of attainder if it: (1) determines the guilt of an individual or identifiable group; (2) inflicts punishment upon that individual or group; and (3) inflicts punishment without the protection of a judicial trial. *Nixon v. Administrator of General Services*, 433 U.S. 425, 468 (1977). Section 1113 meets these criteria.

A. Section 1113, by denying federal financial aid to students unless they prove compliance with draft regis-

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[1]Higher Education Act of 1965 §§ 401(a), 402, 404(b)(3) and (4), 421(a), 428(a)(1) [79 Stat. 1219 (1965)]; S. Rep. No. 673, 89th Cong., 1st Sess. *passim* (1965), *reprinted in* 1965 U.S. Code Cong. & Ad. News 4027-4141; H. R. Rep. No. 621, 89th Cong., 1st Sess. *passim* (1976).

tration requirements, is directed at an easily identifiable group of male students who have not registered in accordance with the Selective Service Act yet need financial aid to complete their college educations. In that regard, Section 1113 parallels precisely the amendment that was struck down in *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277 (1867) (directed at confederate doctors, lawyers and clergymen; prohibiting them from practicing their professions unless they swore they had taken no part in the Confederacy), and the statute in *United States v. Brown*, 381 U.S. 437 (1965) (directed at communist labor union officers; prohibiting members of the communist party from holding union office).

Nevertheless, appellants argue that Section 1113 is not a bill of attainder because it permits students to register at any time and still be eligible for financial aid. Section 1113 expressly mandates that students who have not registered pursuant to Section 3 of the Selective Service Act—which requires, *inter alia*, registration *not later than 30 days after* the registrant's 18th birthday—shall be ineligible for any federal aid. Appellants persist in the face of its clear language to argue that Section 1113 allows for late registration by referring to implementing regulations, 34 C.F.R. Part 668, and to statements made during floor debates. The regulations are wholly inconsistent with the clear wording of Section 1113 and can only be viewed as a *post hoc* attempt to cure an otherwise unconstitutional statute. Moreover, the legislative history provides little support for appellants' contention. For these reasons, the statute punishes the past acts of a clearly identifiable group of individuals.

B. Section 1113 inflicts punishment. To determine whether a sanction constitutes punishment in the context of a bill of attainder challenge, the Court may consider three factors: (1) whether the sanction is similar to traditional forms of punishment; (2) whether the law, viewed in light of its restraints, can be said to further non-punitive purposes; and (3) whether there was congressional intent to punish. *Nixon*, 433 U.S. at 473-78.

The Section 1113 sanction is similar to sanctions which this Court has historically struck down as punitive under bill of attainder analysis. *See, e.g., United States v. Lovett*, 328 U.S. 303 (1946). Given the ever-growing importance of education to individuals in our society, the denial of financial aid and consequential deprivation of an opportunity to pursue one's education and career constitutes punishment.

Appellants argue that Section 1113 serves to encourage draft registration compliance and to promote the just allocation of scarce federal aid dollars. Section 1113 instead serves the two goals of punishment—retribution and deterrence—by mandating the deprivation of aid to which nonregistrants would otherwise be entitled. *See Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-9 (1963). As the district court concluded, under appellants' strained interpretation of Section 1113, "every punishment could be renamed an 'encouragement' thereby escaping the Constitution's proscription on bills of attainder." J.S. App. at 16a. Similarly, merely because a statute apportions resources does not distinguish it from punishment in a bill of attainder. Otherwise, Congress could deprive disfavored individuals of government largess without restraint.

Finally, the legislative record is riddled with statements

that evince an intent to punish, and Section 1113 does so effectively.

C. Section 1113 supplants the judicial process by punishing an identifiable group by legislative action. Such a statutory scheme, which automatically imposes a sanction without meaningful judicial intervention, falls precisely within the bill of attainder prohibition. Section 1113 is a constitutionally proscribed bill of attainder because it was intended to and clearly does punish an identifiable group without the protections of a trial.

II. Section 1113 violates the Fifth Amendment's protection against self-incrimination in two ways. First, the statute penalizes those who assert the privilege by denying them access to funds to pursue their educations. Second, the statute's scheme of operation serves to incriminate those who choose to assert their privilege, and also those who register late, in both cases providing notice to enforcement officers that the student is in violation of the law.

A. Section 1113 compels self-incrimination. Whether compulsion exists is determined by focusing on the consequences of invoking the privilege, *i.e.*, whether a penalty or sanction attaches. *Spevack v. Klein*, 385 U.S. 511, 514 (1966). This Court has found the threatened loss of employment, right to contract, reputation, or political office to be inherently coercive, and thus to provide the necessary compulsion. Similarly, Section 1113, by depriving students of finanical aid necessary for them to attend college and consequently to pursue their chosen careers, compels self-incrimination.

Appellants contend that there is no compulsion present here because students have a choice whether or not to

apply for financial aid. However, as this Court found in *Garrity v. New Jersey*, 385 U.S. 493, 497 (1967), and as the district court adopted, "where the choice is 'between the rock and the whirlpool,' duress is inherent in deciding to 'waive' one or the other."

B. Section 1113 also violates the Fifth Amendment because it incriminates even those who assert the privilege against self-incrimination. Section 1113 directs that there be established procedures by the Department of Education for verifying registration status. The implications of an applicant's assertion of his Fifth Amendment rights are clear. The Selective Service System will be put on notice that the applicant is in violation of the law. As the district court found, "[t]he information required is clearly incriminating to nonregistrants and could also furnish a link in the chain of evidence used to prosecute the nonregistrant." J.S. App. at 23a.

In attempting to remove Section 1113 from the scope of the bill of attainder prohibition, appellants argue that late registration is allowed for purposes of eligibility for financial aid. Appellants concede, however, that late registration is still a crime punishable by fine and imprisonment. These "late registrants" who apply for financial aid will therefore incriminate themselves.

III. Section 1113 violates the Fifth Amendment right to equal protection under the law because it discriminates on the basis of wealth. It is an enforcement statute which affects only economically vulnerable young men. Wealthy young men are immune from its reach and are subject to the traditional criminal process. Furthermore, Section 1113 establishes a wholly unnecessary burden and penalty on

those who cannot afford to attend college without such assistance, thus limiting access of less wealthy nonregistrants to education.

ARGUMENT

INTRODUCTION

When Congress decided to use the federal student financial assistance program to enforce the Selective Service Act, it embarked on a course fraught wtih constitutional perils. Ordinarily, our legal system relies on criminal sanctions, imposed after trial and conviction, to ensure compliance with our penal laws. In enacting Section 1113, however, Congress elected to by-pass judicial trial and to proceed directly to the punishment phase by denying student aid funds to an economically vulnerable segment of our youth who cannot—or will not—certify that they have complied with the registration requirements of the Selective Service Act. Congress' decision to bar financial assistance to needy students who cannot—or will not—submit a certification is inconsistent with at least three significant constitutional conditions.

First, it constitutes the imposition of legislative punishment without trial for the violation of a penal statute. Thus, to the extent that Section 1113 acts to bar persons who failed to register for the draft within 30 days of their 18th birthday from access to federal financial aid needed to complete their educations, it cannot be distinguished from the test oath programs aimed at supporters of the Confederacy that were invalidated as bills of attainder in *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277 (1866) and *Ex parte Garland*, 71 U.S. (4 Wall.) 333 (1867).

Second, it violates deeply rooted Fifth Amendment values which forbid the government from forcing its citizens to submit to test oaths as a law enforcement technique. Indeed, the very purpose of the ban on self-incrimination was to prohibit the practice of forcing citizens to swear or certify that they had not violated the law.

Moreover, to the extent the government seeks to distinguish Section 1113 from the post-Civil War test oaths invalidated in *Cummings* and *Garland*, it merely exacerbates the Fifth Amendment violation. If, as the government argues, Section 1113 can be read beyond its literal terms to permit a student to avoid its impact by late registration, the very act of confessing to late registration constitutes a self-incriminatory admission for which the government has been careful to deny immunity. Thus, unless the government is prepared to immunize such information in order to foreclose its use in a criminal prosecution, the Amendment is caught between the Scylla of the Bill of Attainder Clause and the Charybdis of the Fifth Amendment.

Third, limiting access to education of economically vulnerable students and singling them out for special law enforcement attention violates our Nation's commitment to the equal protection of the laws. The most fundamental aspect of our system of law is its equal applicability to rich and poor alike. The obligation to defend the Nation is one that knows no economic distinction. Yet by unleashing an enforcement scheme which impacts only on the poor while leaving the rich wholly unscathed, Congress has established a dual system for the enforcement of the Selective Service Act which, by its terms, operates on the basis of wealth. While we have progressed from the days of the Civil War draft when wealthy Americans

were permitted to purchase substitutes, we cannot tolerate any Selective Service enforcement system which operates more harshly on the poor than on the rich.

I. SECTION 1113 CONSTITUTES A BILL OF ATTAINDER.

The first article of the United States Constitution declares that "No Bill of Attainder or Ex Post Facto Law shall be passed. . . ." U.S. Const. art. I, § 9, cl. 3.

This prohibition denies legislatures the ability to presume an individual or designated group of individuals guilty of a crime and to inflict punishment without judicial process. *United States v. Brown*, 381 U.S. 437, 442 (1965); *United States v. Lovett*, 328 U.S. 303, 318 (1946); *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 323 (1867).

The prohibition against bills of attainder was drafted by the Constitutional framers who were well aware of how legislative action was used to punish the "disloyal" in eighteenth century England.[2] Thus, this Court recognized:

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[2] II Wooddeson, *A Systematical View of the Laws of England* 638 (1792). *See* Chafee, Jr., *Three Human Rights in the Constitution of 1787*, at 103-18 (1956).

The rationale of the framers was expressed by Alexander Hamilton:

> Nothing is more common than for a free people, in times of heat and violence, to gratify momentary passions, by letting into the government principles and precedents which afterwards prove fatal to themselves. Of this kind is the doctrine of disqualification, disfranchisement, and banishment by Acts of the legislature. The dangerous consequences of this power are manifest . . . [I]f [the legislature] may banish at discretion all those whom particular circumstances render obnoxious, without hearing or trial, no man can be safe, nor know when he may be the innocent victim of a prevailing faction. The name of liberty applied to such a government would be a mockery of common sense.

III Hamilton, *History of the Republic of the United States* 34 (1959).

"When our Constitution and Bill of Rights were written, our ancestors had ample reason to know that legislative trials and punishments were too dangerous to liberty to exist in the nation of free men they envisioned, and they proscribed Bills of Attainder." *Lovett*, 328 U.S. at 318.

This Court most recently defined bills of attainder in *Nixon v. Administrator of General Services*, 433 U.S. 425, 468 (1977), as legislation which: (1) determines guilt of an individual or identifiable group; (2) inflicts punishment upon that individual or group; and (3) inflicts punishment without the protections of a judicial trial. Section 1113 meets these criteria for classification as a bill of attainder.

A. Section 1113 Legislatively Determines the Guilt of an Identifiable Group.

A bill of attainder is legislation that targets a specific individual or group.[9] For example, *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277 (1867), concerned a post-Civil War amendment to the Missouri constitution targeting confederate doctors, lawyers, and clergymen by requiring all doctors, lawyers, and clergymen to swear an oath that they had no connection with the Confederacy. Failure to swear truthfully the required oath resulted in automatic disbar-

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[9]It is not required that the proscribed bill of attainder identify offenders by name or specifically declare their guilt. *Cummings, supra; Ex Parte Garland*, 71 U.S. (4 Wall.) 333 (1967). Rather, the constitutional proscription has been broadly interpreted:

> The best available evidence, the writings of the architects of our constitutional system, indicates that the Bill of Attainder clause was intended not as a narrow, technical (and therefore soon to be outmoded) prohibition, but rather as an implementation of the separation of power, a general safeguard against legislative exercise of the Judicial function, or more simply — trial by legislature.

United States v. Brown, 381 U.S. 437, 442 (1965).

ment from one's vocation. Cummings, a priest, refused to take the test oath and challenged his disbarment from his chosen vocation.

In striking down the Missouri amendment as an unconstitutional bill of attainder, this Court found that it "presume[s] the guilt of priests and clergymen, and adjudge[s] the deprivation of their right to preach or teach unless the presumption be first removed by their expurgatory oath—in other words, [the State Legislature] assume[s] the guilt and adjudge[s] the punishment conditionally." 71 U.S. (4 Wall.) at 325.

A century later, this Court was faced with another bill of attainder in *United States v. Brown*, 381 U.S. 437 (1965), where § 504 of the Labor-Management Reporting and Disclosure Act of 1959 prohibited past or present members of the Communist Party from holding offices in labor unions. The purported purpose of this legislation was to protect the national economy by minimizing the danger of political strikes. Reaffirming the reasoning of *Cummings*, this Court found at 449-50:

> Under the [Cummings-Garland-Lovett] line of cases [§ 504] plainly constitutes a bill of attainder [for it] does not set forth a generally applicable rule decreeing that any person who commits certain acts or possesses certain characteristics (acts and characteristics which, in Congress' view, make them likely to initiate political strikes) shall not hold union office, and leave to courts and juries the job of deciding what persons have committed the specified acts or possess the specified characteristics. Instead, it designates in no uncertain terms the persons who possess the feared characteristics and therefore cannot hold union office . . . members of the Communist Party.

Section 1113 is specifically directed at a group in much the same way as Missouri's constitution was directed at confederate doctors, lawyers and clergymen in *Cummings* and the Labor-Management Reporting and Disclosure Act was directed at Communist labor union officers in *Brown*. In both of these cases, the legislation in question required that members of the targeted groups take affirmative action, in the form of an oath or confirmation, in order to escape the presumption of guilt placed upon them by the legislative action. Similarly, Section 1113 targets young male students who need financial aid to complete their college educations but have not fully complied with draft registration requirements. The provision requires every student who must register for the draft to submit a statement of compliance in order to escape the presumption of guilt for his act of nonregistration.[4] Obviously, as in *Cummings* and *Brown*, members of the targeted group are not able to escape because they cannot truthfully respond in an oath or statement, and thus, punishment ensues. This is precisely how a bill of attainder such as Section 1113 works.

Appellants argue that Section 1113 differs from the legislation addressed in *Cummings* and *Brown*, and therefore does not constitute a bill of attainder, because it does not target persons who have engaged in "past or inera-

[4]Although Section 1113's requirement of a statement of compliance applies only to individuals who are required to register under Section 3 of the Military Selective Service Act, 50 U.S.C. App. § 453, the regulations promulgated under Section 1113 require submittal of the statement by all students, including women and men of all ages. *See* 34 C.F.R. § 668.24, 48 Fed. Reg. 15584 (April 11, 1983). The regulations therefore exceed the delegation of authority under the statute and are void on this basis.

dicable" conduct. Appellants claim that Section 1113 leaves "everyone free to escape the disqualification the law imposes," and therefore it is similar to the legislation found to be constitutional in *American Communications v. Douds*, 339 U.S. 382 (1950). Appellants' Brief at 13-15.[5] Appellants' assertions fail for two reasons.

First, the continuing vitality of *Douds* is in serious doubt in light of the Court's more recent decision in *Brown* which invalidated the successor to the legislation considered in *Douds*.[6] In *Brown*, the Court stated that evil or illegal conduct could not automatically be attributed to members of the Communist Party as was the effect of the legislation in both *Brown* and *Douds*. Therefore, the emphasis in *Douds* on whether an individual could "escape

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[5]Appellants in their Brief at 13-14 attempt to analogize the operation of Section 1113 to the Veterans Benefits Act, 38 U.S.C. § 1651 *et seq.*, which provides educational assistance to those who served honorably, by choice or under draft, in a branch of the Armed Services. Appellants are correct in pointing out that this benefit is not available to those have not served. However, the stated purposes of the Act include making the service "more attractive," compensating for "lost educational opportunities" to those whose lives have been interrupted or impeded by military service, and assisting in the attainment of "vocational and educational status which they might normally have aspired to and obtained had they not served their country." 38 U.S.C. § 1651. All these purposes are related to military service or the consequences thereof. How this Act relates to Section 1113 is difficult to ascertain. Young men at a certain age *are required by law* to register for the draft, subject to criminal penalties for noncompliance. Section 1113 involves an assumption of guilt of the crime of nonregistration and imposes a punishment totally unrelated to the crime. These are the criteria that transform a simple conditional benefit into a bill of attainder.

[6]A three-judge plurality in *Douds* upheld the constitutionality of Section 9(h) of the Taft-Hartley Act which conditioned a labor union's access to the National Labor Relations Board upon the filing of affidavits by the union's officers attesting that they were not members of the Communist Party at that time.

disqualification" is now of little consequence in bill of attainder analysis. Indeed, appellants recognize in their Brief at 16, n. 6, that the validity of Douds is in question.[7]

Second (assuming, *arguendo*, that *Douds* still has some precedential value), unlike the legislation in *Douds*, Section 1113 *on its face* singles out an identifiable group based on *past conduct*. Section 1113 *unambiguously* provides:

> (f) (1) Any person who is required *under Section 3* [of the Military Selective Service Act, 50 U.S.C. App. § 453] to present himself for and submit to registration *under such section* and fails to do so in accordance with any rule or regulation issued *under such section*, shall be ineligible for any form of assistance or benefit provided under title IV of the Higher Education Act of 1965.

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[7]Congress assumed in the *Douds* statute that Communists were likely to cause trouble within unions and therefore no members of the Communist party should hold union offices. Even though the Court in *Douds* found that a union officer's ability to leave the Communist Party saved the applicable statute, the Court in *Brown*, 381 U.S. at 458, in no way supports that result:

> Historical considerations by no means compel restriction of the bill of attainder ban to instances of retribution. A number of English bills of attainder were enacted for preventive purposes — that is, the legislature made a judgment, undoubtedly based largely on past acts and associations . . . that a given person or group was likely to cause trouble . . . [in the future] and therefore inflicted deprivations upon that person or group in order to keep it from bringing about the feared event.

See also Bryson v. United States, 396 U.S. 64, 75-76 (1969) (Douglas J., dissenting) ("Whatever may be said technically about any remaining vitality of the *Douds* case, it obviously belongs to a discredited regime, though, like *Plessy v. Ferguson*, 163 U.S. 537, it has never been officially overruled.")

(Emphasis added). The operative Presidential Proclamation issued under Section 3 requires, *inter alia,* that all male citizens born after January 1, 1963, *must* register within *thirty* days before or after they reach their eighteenth birthday. Proc. No. 4771, 45 Fed. Reg. 45247 (July 2, 1980). Failure to register *within that period of time* is a crime punishable upon conviction with a sentence of up to five years in prison and a fine of up to $10,000; failure to register within the time period creates a permanent status which cannot be expunged merely by subsequent registration. Hence, Section 1113 sanctions a "past and ineradicable" act.[8]

Appellants concede that Section 1113 may be interpreted as requiring registration *within the time* fixed by Proclamation No. 4771, but nonetheless ask the Court to interpret the language "in accordance with" contained in Section 1113 to mean merely "in the manner." In this "postmortem" attempt to save the statute, appellants thus claim that it is possible to construe Section 1113 to allow late registration. Appellants' Brief at 17. No court, dictionary or other authority has been found which defines "in accordance with" as "in the manner."[9] But even if this

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[8] *See United States* v. Martin, 557 F.Supp. 581 (N.D. Iowa 1982), where the court found that the law imposes no continuing duty to register beyond the period provided for in Presidential Proclamation No. 4771 and a person may be prosecuted for not registering within the specified period. An appeal is pending.

[9] *See, e.g., The State ex rel. Pizone v. City of Cleveland,* 295 N.E. 2d 408, 411 (Ohio 1973) (defining "in accordance with" as "in substantial conformance with," allowing a more stringent interpretation but not a lesser one); *City and County of San Francisco v. Boyd,* 140 P.2d 666, 668 (Cal. 1943); *City of Norfolk v. Norfolk Landmark Publishing Co.,* 28 S.E. 959, 960 (Va. 1898); 20A Words and Phrases, Perm. Ed. 23-25 (1983); *Oxford English Dictionary* 62 (Oxford 1933); *Black's Law Dictionary* 16 (West 1979).

definition is accepted by the Court, it could not change the meaning of Section 1113, which *expressly* requires compliance with Section 3 of the Military Selective Service Act in order to receive financial aid. The words of Section 1113 could not be more clear.[10]

Appellants point to regulations promulgated by the Department of Education in consultation with the Selective Service System as support for interpreting Section 1113 as allowing late registration. *See* 34 C.F.R. Part 668, 48 Fed. Reg. 15578-84 (April 11, 1983). Not only are the regulations irrelevant in this challenge to Section 1113, but they are also inconsistent with the plain meaning of Section 1113 and, as the district court held, are void. J.S. App. B at 33a-34a. *See Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 213-14 (1976) ("The rule-making power granted to an administrative agency charged with the administration of a federal statute is not the power to make law. Rather, it is 'the power to adopt regulations to carry into effect the

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[10]The intention of the legislature is first of all to be found in the words of the statute, taking them in their natural and ordinary sense. It is fundamental that the plain and ordinary meaning of statutory language controls as words are the means by which legislative will is conveyed to the public. If the words are free from ambiguity, there is neither necessity nor justification for resorting to other means of interpretation. *Ex Parte Collett*, 337 U.S. 55, 61 (1949); *Caminetti v. United States*, 242 U.S. 470, 485 (1917); *see also* McCaffrey, F., *Statutory Construction* 38 (1953); Sands, C., 2A *Sutherland Statutory Construction* § 46.01 (1973) [and cases cited therein].

On page 17 of their brief, appellants cite to a *part* of Section 1113 that in their opinion "supports" the proposition that nonregistrants are allowed to register late in order to qualify for financial aid. What appellants conveniently omitted in their quotation were two express references to the registration requirements of and under Section 3. As discussed, *supra*, these requirements include registration within 30 days of a male's eighteenth birthday.

will of Congress *as expressed by the statute.'* ") (Emphasis added).

Appellants' final argument is that Section 1113 should be interpreted to allow for late registration in light of congressional intent. Appellants' Brief at 15, referring to Brief at 5-6. To the contrary, the sponsors of the bill in both the Senate and the House understood quite clearly what Section 3 of the Military Selective Service Act requires. Senator Mattingly stated that, "as long as we have the law [of draft registration], all men *reaching the age of 18* should and must register for it. . . . If a young man decides he will ignore this law, he should not be eligible for financial assistance from the Federal Government." 128 Cong. Rec. S4943 (May 12, 1982) (emphasis added). Representative Solomon describes the registration law as "the law of the land which requires that all men between the ages of 18 and 19 register." 128 Cong. Rec. H4757 (July 28, 1982).[11]

Appellants' distorted view of Section 1113, if adopted, has serious consequences. First, their interpretation requires the conclusion that Congress amended, or partially repealed, Section 3 of the Military Selective Service Act (even though that intention was nowhere expressed). Alternatively, by permitting late registration for the purpose of financial aid eligibility, appellants are actually compelling self-incrimination by requiring delivery of information

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[11]Any argument that Congress intended to permit late registration is undercut by the fact that Congress rejected an amendment by Representative Simon which would have specifically permitted late registrants to receive financial aid. 128 Cong. Rec. H4758-59 (July 28, 1982). As appellants agree, the registration law (Section 3 of the Military Selective Service Act) does not allow one to avoid its penal sanctions by registering late. Appellants' Brief at 17, n.7.

which provides a link in the chain of evidence used to prosecute the nonregistrant."[12] Moreover, if appellants "promise" not to enforce Section 3 against students who apply for financial aid and who are late registrants, appellants would treat such late registrants unequally from nonstudents and late registrants who do not apply for aid, thus creating equal protection problems.

As the district court found, Section 1113 targets the identifiable group of unregistered male students who need financial aid.

B. Section 1113 Inflicts Punishment.

Section 1113 punishes nonregistrants by denying them "any form" of federal financial assistance under Title IV of the Higher Education Act of 1965.[13] In turn,

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[12]Appellants claim that the form for the statement of compliance as recommended by the regulations, 34 C.F.R. § 668.25, 48 Fed. Reg. 15582 (April 11, 1982), does not require applicants to state *when* they registered. (Appellants' Brief at 6). However, from verification procedures mandated by 50 U.S.C. App. § 462(f)(3) and described in 34 C.F.R. § 668.26, including the submittal of the registration Acknowledgement Letter, SSS Form 3A (which contains both the date of birth and the date of registration), and from the financial aid application, the statement of compliance, financial aid records, and other sources readily available to appellants, the fact of an individual's late registration will be revealed. *See* discussion of self-incrimination, *infra*, Section II.

[13]Under Title IV there are six major programs which provide financial assistance to students seeking higher education. These are National Direct Student Loans, the College Work Study Program, Supplemental Educational Opportunity Grants, Pell Grants, State Student Incentive Grants, and Guaranteed Student Loans. Two out of three students at private colleges are receiving some form of financial aid (*see* Chronicle of Higher Education, April 6, 1981 at 14, cols. 1-5), a substantial portion of which comes from federal student loan and other student assistance programs under Title IV. *See* Chronicle of Higher Education, Jan. 25, 1984 at 1, cols. 4, 5 & 16, cols. 3, 4 & 5.

denial of financial aid forecloses educational and career opportunities.[14] There can be no doubt that the loss of such opportunities constitutes an onerous punishment in our society. *See Plyler v. Doe*, 457 U.S. 202, 221 (1982). As the district court concluded, "[c]onsidering the importance of the opportunity to seek a college education in these times, deprivation of that opportunity based on past conduct of the group deemed to be disloyal seems to this court to be punishment." J.S. App. at 15a.

This Court has identified three factors to consider in determining whether a sanction contained in a statute constitutes punishment: (1) whether the sanction is similar to traditional forms of punishment; (2) whether the law, viewed in light of its restraints, can be said to further nonpunitive purposes; and (3) whether there was Congressional intent to punish. *Nixon v. Administrator of General Services*, 433 U.S. 425, 473-78 (1977). Applying these factors to Section 1113 leads inescapably to the conclusion that the sanction imposed by Section 1113 constitutes punishment within the meaning of the Bill of Attainder Clause.

The first factor involves a comparison of the sanction at issue with historical punishments. While the loss of educational assistance with the concomitant loss of educational and career opportunities is distinguishable from

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[14]Each appellee has stated that he has received financial aid under Title IV and that he will be unable to complete his education at his college or university without financial assistance. Furthermore, each has stated that his career plans require that he complete his college education. Appellees Doe, Roe, and Poe have signed affidavits to this effect. Appellees Boe, Coe and Foe have signed letters to this effect, and their counsel has verified that information in an affidavit as well. *See* J.A. at 11-12, 16, 24-25, and 29.

such historical punishments as imprisonment and fines, the Section 1113 sanction is similar to sanctions which this Court has historically struck down as punitive under bill of attainder analysis. For example, in *Cummings* this Court found that denying a class of persons the opportunity to pursue certain professions constituted punishment. Similarly, in *Ex Parte Garland*, 71 U.S. (4 Wall.) 333 (1867), this Court determined that denying a certain class of persons the opportunity to practice law in federal courts constituted punishment. In *United States v. Lovett*, 328 U.S. 303 (1946), this Court concluded that barring certain people from federal employment constituted punishment. Given the above three cases in which foreclosures of vocational opportunities were determined to be punitive, Section 1113's foreclosure of a broad range of educational and, hence, vocational opportunities is *a fortiori* punishment.

As this Court recognized in *Cummings*, "[t]he deprivation of any rights, civil or political, previously enjoyed, may be punishment. . . ." 71 U.S. (4 Wall.) at 320. Moreover, in *Nixon*, this Court recognized that a rigid interpretation of punishment grounded on historical precedent is not to be adopted because it would preclude "the possibility that new burdens and deprivations might be legislatively fashioned that are inconsistent with the bill of attainder guarantee." 433 U.S. at 475.

Section 1113's sanction of cutting off educational opportunities is just the sort of newly-fashioned burden envisaged in *Nixon*. Post-secondary vocational training and college degrees have become the *sine qua non* of advance-

ment in today's society. To disable a citizen from pursuing such training is to inflict a severe penalty.[18]

The second factor examines whether Section 1113 is penal or regulatory. In *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963), this Court enunciated some considerations to be used in determining whether a sanction is penal:

> Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of scienter, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be con-

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[18]Appellants argue that under *Fleming v. Nestor*, 363 U.S. 603 (1960), Section 1113's deprivation of financial aid is a "mere denial of a noncontractual government benefit." Appellants' Brief at 21. Appellants' reliance on *Fleming* is misplaced. That case, which upheld a provision of the Social Security Act that permitted termination of benefits to an alien who is deported on certain grounds, turned on the oft-noted fact that the benefits at issue were "noncontractual". *Id.* at 610, 611, 617. The Court expressly refused to recognize Social Security benefits as "accrued property rights" which merit constitutional protection. *Id.* at 610. Ten years later, however, this Court rejected the notion that welfare benefits were noncontractual privileges free from constitutional protections. *Goldberg v. Kelly*, 397 U.S. 254, 262 (1970). And in *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976), disability benefits under the Social Security Act were held to be a "property" interest protected by the Constitution. Thus, the underpinnings of *Fleming* have been removed.

Moreover, in *Fleming*, no deprivation could take place until an alien had been subjected to deportation proceedings which complied with procedural due process of law and until an alien had an opportunity to seek judicial review of the deportation order. Under Section 1113, deprivation follows automatically from a failure to file a statement of compliance.

> nected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned. . . .

Under the *Kennedy* criteria, Section 1113 is penal. By denying needy and intelligent students access to education, it acts as both a disability and a restraint. Restraints similar to that of Section 1113 have historically been interpreted by this Court to constitute punishment. *See Cummings, Garland,* and *Lovett.* By imposing its sanction before any hearing, Section 1113 assumes that nonregistrants possess guilty intent. Section 1113 also promotes the traditional aims of punishment by imposing retribution against nonregistrants and by deterring future nonregistration, and it applies to behavior which is already a crime. *See* 50 U.S.C. App. § 462 (1981). In addition, Section 1113 has no educational purpose to which it may rationally be connected. Finally, by applying to those who have inadvertently failed to register as well as those who have intentionally failed to register, it is excessively broad.

Appellants contend that Section 1113 has regulatory goals, one of which is to encourage registration. "Encouragement" is a devious euphemism for the sanction of Section 1113. "Encouragement" connotes positive reinforcement and rewards. By contrast, Section 1113 mandates a denial of all forms of federal financial assistance and forecloses educational and vocational opportunities. In that manner, Section 1113 serves two goals of punishment—retribution and deterrence. *See Brown,* 381 U.S. at 458. As the district court concluded, under the appellants' strained interpretation of Section 1113, "every

'punishment' could be renamed an 'encouragement' thereby escaping the Constitution's proscription on bills of attainder." J.S. App. at 16a.

Appellants also suggest that Section 1113 furthers the allegedly nonpunitive goal of achieving "a fair allocation of increasingly scarce federal aid dollars."[16] A truly regulatory statute would reflect an allocation of resources based on a rational consideration of objective criteria relevant to the subject matter, here higher education and financial need. Merely because a statute apportions resources in some manner does not make it regulatory. Otherwise, Congress could deprive any disfavored group of an almost endless variety of grants, benefits, and government largesse without violating the Bill of Attainder Clause.[17]

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[16]Appellants' Brief at 23. Appellants' "fair allocation" argument reflects a misunderstanding of the thrust of appellees' objection to Section 1113. Appellees do not argue that Congress is without power to bar persons found guilty after judicial trial of violating the Selective Service Act from access to student loan funds. While such a punishment inflicted after judicial trial would be harsh and perhaps shortsighted, it may well rest within the power of Congress. Rather, appellees object to Section 1113 because it inflicts such a punishment without the "formality" of a finding of guilt after judicial trial.

[17]Appellants cite *Fullilove v. Klutznick*, 448 U.S. 448 (1980), as supporting the claim that there exists a broad right to condition the receipt of federal monies in any way. *Fullilove* neither addressed nor supported the imposition of conditions in violation of the Bill of Attainder Clause. In *Fullilove*, the Court upheld an administrative requirement, which could be waived, that at least 10 percent of federal funds granted for local public works projects be used to procure services from "minority business enterprises." This "condition" was upheld because it furthered Congress' policy of remedying past racial discrimination. Interestingly, the Court stated at 490:

> The Congress must proceed only with programs narrowly tailored to achieve its objectives . . . and, when such a program comes under judicial review, *courts must be satisfied that the legislative objectives and projected administration give reasonable assurance that the pro-*

Appellants argue that the fact that Section 1113 applies to conduct which is already a crime, standing alone, does not prove that the real purpose behind Section 1113 is punitive. Appellants' Brief at 25. However, as discussed herein, that fact does not stand alone. Rather, it is just one of a long list of telling and probative indications that Section 1113 has a punitive function.

The third factor in *Nixon* scrutinizes the motivation of the legislators. The inquiry is "whether the legislative record evinces a congressional intent to punish." 433 U.S. at 478. That Congress had precisely a punitive intent is demonstrated by the fact that Section 1113 was not drafted as a part of an education act, but rather is an amendment to, and is codified within, Section 12 of the Selective Service Act entitled, "Offenses and Penalties." Surely, when Congress itself calls a statute a "penalty," further inquiry is unnecessary. *See* n. 10, *supra* at 17.

Furthermore, the Congressional record is rife with statements evincing an intention to punish. For instance, its sponsor declared, "I intend to offer the same amendment *until every young man is deprived of Federal assistance unless he has obeyed the law...* ." Comments of Representative Solomon, 128 Cong. Rec. H4757 (July 28, 1982) (emphasis added). His intent is explicit: he wanted to punish all nonregistrants by depriving them of federal aid of any kind. Similarly, Representative Montgomery, cosponsor of Section 1113, stated, "[i]t is a felony, they have

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gram will function within constitutional limitations. (Emphasis added.)

Here, Congress' attempt to enforce a criminal statute, without the usual constitutional guarantees associated with arrest and trial, through the vehicle of disbursement of federal financial aid to college students, is not within the bounds of constitutional limitations.

violated the law, and they are not entitled to these educational benefits." *Id.*

The opponents of Section 1113 clearly recognized the punitive motivation reflected in the above comments made by supporters of the legislation. For example, Representative Edgar stated, "[t]his amendment has the obvious primary objective of increasing the number of men registered. . . . However, it has a secondary, and more subtle, objective, which is to punish those individuals who do not register. 128 Cong. Rec. H4760 (July 28, 1982). Representative Goldwater added that a nonregistrant "not only stands a chance of going to jail, but he also stands a chance of not receiving financial assistance for education, which is just as harsh a penalty in terms of the boy's future." 128 Cong. Rec. H4761 (July 28, 1982).[18]

Senator Hayakawa, sponsor of the Senate bill, captured the pervading animus of Section 1113 when he said, "Shall we allow nonregistrants to ask this country to provide for their educational needs when they have no intention of fulfilling their national obligation? The answer is clearly, no. . . . This [statute] is an important signal to every American that *this Congress will not tolerate any willful, blatant rejection of the responsibilities* which come with living in a free nation." 128 Cong. Rec. S4944 (May 12, 1982) (emphasis added).

The sanction of Section 1113, the denial of federal financial aid, is historically punitive; functions in a punitive manner; and was intended to be punitive. Hence, Section

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[18] *See also* remarks of Representative Moffett, 128 Cong. Rec. H4758 (July 28, 1982) ("additional penalty"); remarks of Representative Patterson, 128 Cong. Rec. H4760 (July 28, 1982) ("What is the intended punishment for those who do not need or require student aid assistance?").

1113 inflicts punishment within the meaning of the Bill of Attainder Clause.

C. Section 1113 Legislatively Determines Guilt and Inflicts Punishment Without Benefit of the Protections of a Judicial Trial.

Section 1113, by automatically imposing a sanction without judicial intervention, falls precisely within the Bill of Attainder prohibition. In *Lovett* a provision denying specific federal employees their jobs because they were believed to be "subversive" was found to inflict punishment without the safeguard of judicial trial, and was struck down as an unlawful bill of attainder. This Court noted that the Bill of Attainder Clause was included in the Constitution in order "to safeguard the people of this country from punishment without trial by duly constituted courts." 328 U.S. at 317.

Appellants make much of the fact that there is a provision in Section 1113 for a hearing if requested. On the basis of that, they argue that the judicial process has not been supplanted. This argument betrays a misunderstanding of both the judicial process and bill of attainder law.

The hearing permitted by Section 1113 takes place *only* when an applicant for aid asserts that "he is in compliance with the registration requirement" and yet has been denied aid on the basis of nonregistration. 34 C.F.R. § 668.27 (c)(2). At the hearing, the applicant bears the burden of proof, and the sole inquiry is whether or not he registered. 34 C.F.R. § 668.27(c)(3). In other words, appellants'

asserted "judicial process" is not available to all who are punished by Section 1113.[19] Indeed, all of the six appellees have been punished, yet none has had a hearing which comports with due process.[20]

The fallacy of appellants' argument that the hearing provided for in Section 1113 is adequate to withstand scrutiny under bill of attainder analysis is best seen by considering whether a provision for such a hearing would have saved the statutes struck down in *Cummings*, *Garland*, and *Lovett*. Had Section 1113's scheme been written into the legislative act in *Cummings*, a hearing would have

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[19]To those few for whom an administrative hearing is available (those who have signed the statement of compliance and whose veracity or registration status is challenged), the hearing, with the burden on the disabled party, provides none of the protections of a judicial trial and is clearly inappropriate when the real issue being adjudicated is the crime of failing to register. Assuming, *arguendo*, that an administrative tribunal could properly decide the issue of a failure to register without violating the Fifth and Sixth Amendments, an opportunity to raise defenses must be permitted in order to adjudicate the issue fully. However, the regulations specifically provide that the hearing officer "shall *not* consider challenges based on constitutional or other grounds to the requirements that a student state and verify . . . compliance with registration requirements, or to those registration requirements themselves." 34 C.F.R. § 668.27(c)(3). (Emphasis added.)

[20]In *Lovett* the Court described the due process rights to which every accused is entitled:

> An accused in a court must be tried by an impartial jury, has a right to be represented by counsel, must be clearly informed of the charge against him, the law which he is charged with violating must have been passed before he committed the act charged, he must be confronted by the witnesses against him, he must not be compelled to incriminate himself. . . .

328 U.S. at 317-18. *See Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963) (striking down a statute which imposed an automatic forfeiture of citizenship as being violative of due process and fair trial rights of Fifth and Sixth Amendments).

been granted not to ex-Confederates who refused to take the oath and thereby forewent professional certification. Rather, it would have been available only to those few who took the oath and whose veracity was subsequently challenged. At the hearing, the person who had been challenged would have the burden of demonstrating that he had not served the Confederate cause. Hanging in the balance would be his ability to pursue his chosen vocation. Such a scheme would not have changed the outcome in *Cummings* and should not change the conclusion in this case that Section 1113 punishes a group of people without the protections of the judicial process.

Section 1113, by inflicting punishment on an identifiable group of people without affording them the protections of a trial, constitutes a bill of attainder.

II. SECTION 1113 VIOLATES THE FIFTH AMENDMENT'S PROTECTION AGAINST SELF-INCRIMINATION

The Fifth Amendment provides that no person "shall be compelled in any criminal case to be a witness against himself . . .."[21] The policies underlying the Amendment

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[21]This important constitutional protection is to be interpreted broadly, in keeping with the Amendment's spirit. *Ullmann v. United States*, 350 U.S. 422, 426 (1956); *Quinn v. United States*, 349 U.S. 155, 162 (1955). While the Amendment expressly applies to criminal cases, it is clear that it "can be claimed in *any proceeding*, be it criminal or civil, administrative or judicial, investigatory or adjudicatory . . . it protects *any disclosures* which the witness may reasonably apprehend *could be used in a criminal prosecution or which could lead to other evidence that might be so used.*" *In Re Gault*, 387 U.S. 1, 47-48 (1967) (emphasis in original), citing *Murphy v. Waterfront Comm'n*, 378 U.S. at 94 (White J., concurring). In other words, "the availability of the privilege does not turn upon the type of proceeding in which its protection is invoked, but upon the nature of the statement or admission and the exposure which it invites." *Gault* at 49.

have been expressed as follows:

> It reflects many of our fundamental values and most noble aspirations: our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt; our preference for an accusatorial rather than an inquisitional system of criminal justice; our fear that self-incriminating statements will be elicited by inhumane treatment and abuses; our sense of fair play which dictates "a fair state-individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing him and by requiring the government in its contest with the individual to shoulder the entire load" . . .; our respect for the inviolability of the human personality and of the right of each individual "to a private enclave where he may lead a private life" . . .; our distrust of self-deprecatory statements; and our realization that the privilege, while sometimes "a shelter to the guilty," is often "a protection to the innocent."

Murphy v. Waterfront Comm'n, 378 U.S. 52, 55 (1964) (citations omitted).

The privilege extends not only to the information that would in itself be incriminating, but also to answers that would furnish a link in a chain of evidence to prosecute:

> To sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the

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(Footnote 21 continued)

The term "witness" in the Amendment is used in a broad sense to include "one who, at the time the disclosures are sought from him, is not a defendant in a criminal proceeding." *Garner v. United States*, 424 U.S. 648, 652 n. 7, 656 (1976) ("the information revealed in the preparation and filing of an income tax return is, for the purpose of Fifth Amendment analysis, the testimony of the witness").

> question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result.

Hoffman v. United States, 341 U.S. 479, 486-87 (1951). *See also Maness v. Meyers*, 419 U.S. 449, 461 (1975). Thus, the privilege protects any disclosures that a person may reasonably apprehend could be used in a criminal prosecution or could lead to other evidence that might be used to prosecute. *Murphy*, 378 U.S. at 94 (White, J., concurring).

Section 1113 is a penal statute requiring certification by each applicant for financial aid that he has complied with Section 3 of the Military Selective Service Act.[11] Failure to register under the Act is a criminal offense. 50 U.S.C. App. § 462 (1981). Similarly, a student who provides a false statement of compliance is subject to prosecution for perjury. 20 U.S.C. § 1097 (1982).

Appellees contend, and the district court found, that Section 1113 violates the Fifth Amendment in two ways. First, the statute penalizes those who assert the privilege by denying them access to Title IV funds to pursue their educations, impermissibly burdening the exercise of the privilege. Second, the statute's scheme of operation serves to incriminate those who choose to assert the privilege, and also those who register late to obtain financial aid, in both cases putting the Selective Service System on notice that the student is in violation of the law.

The trilemma facing nonregistrant students is no less cruel and impermissible in the present case than it was in *Murphy*. Here students must (a) accuse themselves as non-

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[11] See discussion, *supra* at 22-23.

registrants by claiming the privilege, (b) commit perjury, or (c) forego financial aid, and thus higher education and the pursuit of their chosen careers."[28] To claim, as the government does, that students need not apply for federal educational assistance begs the question. See n. 14, *supra* at 20.

A. Section 1113 Compels Self-Incrimination.

Appellants' discussion of the Fifth Amendment focuses exclusively on whether or not self-incrimination is "compelled." They argue, first, that appellees need not apply for federal aid (and thus need not provide incriminating information), and second, that under Section 1113 nonregistrants are ineligible for federal aid and thus it is "inconceivable that one is compelled in any way to apply for benefits for which he is ineligible." Appellants' Brief at 30-32.

Whether compulsion exists is determined by focusing on the consequences of invoking the privilege, typically by

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[28]Section 1113, by requiring needy students to implicate themselves in a criminal act, commit perjury or leave school is a classic "test oath" in flagrant violation of the core of the Fifth Amendment. *See* Levy, *Origins of the Fifth Amendment* 330-31 (1965). Instead of a process which establishes guilt by investigation and adjudication, the test oath permits the State to punish all who cannot—or will not—attest to their innocence, thus reversing the presumption of innocence. If the government is permitted to target needy students and subject them to a test oath as a means of enforcing the Selective Service Act, no principled limitation will exist to the spread of the test oath device into other areas of criminal law enforcement. If student loans may be conditioned on the satisfaction of a test oath involving an unrelated penal statute, so may a virtually limitless array of programs, ranging from drivers' licenses to health benefits to telephone service. Fortunately, the intersection of the privilege against self-incrimination and the prohibition on Bills of Attainder precludes our society from drifting toward law enforcement by test oath.

examining whether a penalty or sanction attaches. The Fifth Amendment guarantees against federal infringement "the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty . . . for such silence." *Spevack v. Klein*, 385 U.S. 511, 514 (1966), citing *Malloy v. Hogan*, 378 U.S. 1, 8 (1964). The Court defined "penalty" as follows:

> In this context "penalty" is not restricted to fine or imprisonment. It means, as we said in *Griffin v. California*, 380 U.S. 609, the imposition of *any sanction* which makes assertion of the Fifth Amendment privilege "costly."

385 U.S. at 515 (emphasis added).

In *Spevack*, the Court held that "[t]he threat of disbarment and the loss of professional standing, professional reputation, and of livelihood are powerful forms of compulsion to make a lawyer relinquish the privilege." *Id.* at 516. It expressly recognized that such threats are "as powerful an instrument of compulsion as the 'use of legal process' . . .." *Id.*, citing *United States v. White*, 322 U.S. 694, 698 (1944). *See also Lefkowitz v. Cunningham*, 431 U.S. 801, 806-07 (1977). Thus, contrary to appellants' suggestion, legal process is not the only means of compulsion. The denial of federal financial aid and the termination of higher education and one's chosen career for not providing incriminating information is a penalty which makes the assertion of the privilege "costly" indeed.

On the record before the Court, it is undisputed that appellees have stated unequivocally that without federal educational assistance they will be unable to continue to attend college. J.A. at 11-12, 16, 24-25 and 29. As-

suming, *arguendo*, that each could find an alternative source of financing his education, the ability to do so does not cure Section 1113. This Court rejected a government argument that architects who claimed their Fifth Amendment privilege, and who were consequently barred from public contracting for five years, could find employment in the private sector and would not therefore suffer a penalty sufficient to compel their testimony:

> "[T]he plaintiffs' disqualification from public contracting for five years as a penalty for asserting a constitutional privilege is violative of their Fifth Amendment rights." We fail to see a difference of constitutional magnitude between the threat of job loss to an employee of the State, and a threat of loss of contracts to a contractor.
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> * * *
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> A significant infringement of constitutional rights cannot be justified by the speculative ability of those affected to cover the damage.

Lefkowitz v. Turley, 414 U.S. 70, 83-84 (1973) (citation omitted).

The present situation fits squarely within the analysis of *Marchetti v. United States*, 390 U.S. 39 (1968), which held that a wagering tax and registration statute violated the Fifth Amendment. Although the Court recognized that the statute assisted in the enforcement of state anti-gambling statutes, it overruled two of its prior decisions holding that the privilege against self-incrimination may not be appropriately asserted by gamblers:

> The question is not whether petitioner holds a "right" to violate state law, but whether, having done so, he may be compelled to give evidence against himself.

> The constitutional privilege was intended to shield the guilty and imprudent as well as the innocent and foresighted; if such an inference of antecedent choice were alone enough to abrogate the privilege's protection, it would be excluded from the situations in which it has historically been guaranteed, and withheld from those who most require it. Such inferences, bottomed on what must ordinarily be a fiction, have precisely the infirmities which the Court has found in other circumstances in which implied or uninformed waivers of the privilege have been said to have occurred. To give credence to such "waivers" without the most deliberate examination of the circumstances surrounding them would ultimately license widespread erosion of the privilege through "ingeniously drawn legislation."

Id. at 51-52 (citations omitted). The relevant question here is not whether appellees choose, on the one hand, to register or, on the other, to apply for financial aid, but whether, having failed to register and finding it necessary to apply for financial aid, they may be forced to choose between incriminating themselves or forfeiting financial aid.

The fact that appellees initially approached the government in applying for financial aid has no bearing on their right to avail themselves of their Fifth Amendment privilege. In this regard, those who fail to register but "choose" to apply for financial aid are no different from those who choose to work for the state, apply for government contracts, or hold office in political parties. *Garrity v. New Jersey*, 385 U.S. 493, 500 (1967) and *Gardner v. Broderick*, 392 U.S. 273, 279 (1968) (police officers cannot be discharged for failure to relinquish the protection of the

privilege against self-incrimination); *Sanitation Men v. Sanitation Comm'r*, 392 U.S. 280, 284 (1968) (city employees may not be discharged for invoking and refusing to waive their right against self-incrimination); *Lefkowitz v. Turley*, 414 U.S. at 83 (independent contractor may not be disqualified from further transactions with the state for refusing to waive immunity); *Lefkowitz v. Cunningham*, 431 U.S. at 805-06 (unsalaried officer of political party cannot be removed from office and disqualified from holding other public office for refusing to waive immunity).

If the tortured arguments of appellants were the law, no Fifth Amendment violations would have been found in any of these cases because the police officer and refuse haulers in *Garrity* and *Sanitation Men* could have found other employment, the architects in *Turley* could have worked in the private sector and the political officer in *Cunningham* could have resigned his post. Similarly, the bookmakers and gamblers in *Marchetti* and *Grosso v. United States*, 390 U.S. 62 (1968) could have chosen other occupations and the Communist Party members in *Albertson v. SACB*, 382 U.S. 70 (1965) could have quit the organization. However, this Court held that all of these people were "compelled" to incriminate themselves because the so-called "choice" was too high a price to pay.

For example, in *Garrity*, 385 U.S. at 497-98, the Court held that the "option to lose their means of livelihood or to pay the penalty of self-incrimination is the antithesis of free choice to speak out or to remain silent." It noted that "where the choice is 'between the rock and the whirlpool' duress is inherent in deciding to 'waive' one or the other." The Court, citing *Union Pac. R.R. Co. v. Pub. Service*

Comm., 248 U.S. 67, 70 (1918), recognized that the existence of a choice does not negate compulsion:

> It always is for the interest of a party under duress to choose the lesser of two evils. But the fact that a choice was made according to interest does not exclude duress. It is the characteristic of duress properly so called.

385 U.S. at 498.

In all of the above cases the Court found the threatened loss of employment, contracts, reputation or political office to be inherently coercive, and thus to provide the necessary compulsion.[24] Here, appellees have no option of receiving federal financial assistance in another way. To receive the assistance they need to attend college under any of the programs funded by Title IV, they must file a statement of compliance. Students who cannot complete their educations without such assistance have no more "choice" whether to file than did the gambler who could "choose" not to gamble or the architect who could "choose" to practice in the private sector. Certainly, the availability of financial aid for higher education must be judged to be of at least the same economic significance as the ability to qualify for government contracts in *Turley*

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[24]In *Minnesota v. Murphy*, No. 82-827 (Feb. 22, 1984), this Court reaffirmed the rationale of these "punishment" cases. In *Murphy* a probationer argued that his privilege against self-incrimination had been burdened because an assertion of the privilege while talking with his probation officer would have led to revocation of his probation. This Court stated that "if the state, either expressly or by implication, asserts that invocation of the privilege would lead to revocation of probation, it would have created the classic penalty situation. . . ." Slip op. at 14. Under Section 1113 invocation of the privilege leads to the loss of financial aid, thus creating "the classic penalty situation."

or the holding of an unsalaried political party office in *Cunningham*.

Finally, even a compelling governmental interest cannot justify a statute which violates the privilege against self-incrimination. While acknowledging that the state had "a strong, legitimate interest" in maintaining the integrity of its civil service and of its transactions with independent contractors furnishing a wide range of goods and services, this Court in *Lefkowitz v. Turley* observed that "claims of overriding interests are not unusual in Fifth Amendment litigation and they have not fared well." 414 U.S. at 78.[25]

In short, legislative objectives cannot be pursued by means which unnecessarily interfere with the exercise of basic constitutional rights. *United States v. Jackson*, 390 U.S. 570, 582 (1968).

B. The Framework of Section 1113 Provides for Self-Incrimination.

Section 1113 prohibits any person "who is required under Section 3 [of the Military Selective Service Act] to present himself for and submit to registration under such section and fails to do so in accordance with any proclamation issued under such section" from receiving "any form of assistance or benefit provided under Title IV of the

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[25]The Court in *Turley* then enumerated cases in which claims of overriding governmental interests were rejected. *See, e.g., McCarthy v. Arndstein*, 266 U.S. 34 (1924) (strong public interest in marshaling and distributing assets of bankrupts); *Brown v. Walker*, 161 U.S. 591, 610 (1896) (that enforcement of the transportation laws "would become impossible"); *Hale v. Henkel*, 201 U.S. 43 (1906) (enforcement of the antitrust laws against private corporations); *Garrity, supra*, and *Gardner v. Broderick*, 392 U.S. 273 (1968) (investigation of police corruption). *See also* n. 17, *supra* at 24.

Higher Education Act of 1965." 50 U.S.C. App. § 462 (f)(1). Presidential Proclamation No. 4771 issued pursuant to Section 3 requires certain male citizens to present themselves for registration according to a schedule based on their calendar year of birth, or within 30 days of their eighteenth birthdays.

Appellants argue, and the regulations promulgated by the Secretary of Education assume, that late registration for the draft is not a disqualification for educational assistance under Title IV.[28] However, if one of the appellees were to register now so that he could submit a statement of compliance acceptable to appellants to obtain financial aid, he would still be in violation of Section 3 of the Selective Service Act. He would not have submitted to registration "in accordance with any proclamation" issued under Section 3 because he registered late. Thus, he would be subject to criminal penalties under the Act and would have furnished information which may be used to prosecute him.

In attempting to remove Section 1113 from the scope of the bill of attainder prohibition, appellants concede that this section operates to induce, if not to coerce, financial aid applicants to waive their privilege against self-incrimination:

> Section 1113 assigns no blame to those who have failed to register. On the contrary, at least for purposes of Title IV aid, *it excuses even those who have willfully defied the law by allowing them a second*

[28]Needless to say, the Secretary of Education may not render an unconstitutional statute constitutional by declaring, through regulation or otherwise, his present intention not to enforce the statute. *See Southeastern Community College v. Davis*, 442 U.S. 397, 411 (1979).

> *chance to comply. The question of blame and punishment for continued nonregistration is reserved for the courts in the context of a criminal prosecution under 50 U.S.C. App. (& Supp. V) 462.*

J.S. at 17 (emphasis added). Again in Appellants' Brief at 17, n. 7, while claiming that "failure to register within the time fixed by Proclamation No. 4771 does not disqualify the registrant for Title IV aid," they admit that "it is a criminal offense punishable under 50 U.S.C. App. (& Supp. V) 462." The government thus is explicit in reserving the right to utilize information obtained from financial aid applicants as a basis of a criminal prosecution for violation of the Selective Service Act, either for nonregistration or for late registration.

In addition, Section 1113 requires the Secretary of Education, in agreement with the Director of the Selective Service System, to prescribe methods for verifying statements of compliance and that these "methods may include requiring institutions of higher learning to provide a list to the Secretary of Education or to the Director of persons who have submitted such statements of compliance." 50 U.S.C. App. § 462 (f) (3). Regulations published by the Secretary of Education specify that verification of registration compliance for academic years beginning on or after July 1, 1985 may be by the student's registration Acknowledgement Letter (SSS Form 3A or 3A-s) which contains both the registrant's date of birth and his date of registration. 34 C.F.R. § 668.26(d) (1)." The location of Section 1113, not as part of any education act but as an amendment to the section of the Selective Service Act which imposes criminal penalties, 50 U.S.C.

"*See* n. 12, *supra* at 19.

App. § 462, when combined with verification procedures outlined in the law and the regulations, strongly implies the consequences of an applicant's assertion of his Fifth Amendment rights. The Selective Service System will be put on notice that the applicant is in violation of the law.

As recognized by the district court, "students who need financial assistance are forced to participate in an administrative process, perhaps even a hearing, where they are asked to assist the government in its investigation of their registration status." J.S. App. at 28a. Here, as in *Albertson v. SACB*, 382 U.S. 70 (1965), the financial aid process requires the furnishing of information which could be used to prosecute the registrant for violation of a federal criminal statute. As specifically found by the district court, "[t]he information required is clearly incriminating to nonregistrants and could also furnish a link in the chain of evidence used to prosecute the nonregistrant." J.S. App. at 23a. On the other hand, if the nonregistrant student availed himself of his Fifth Amendment right to remain silent, he would forego educational benefits, and thus, educational opportunities and the pursuit of his chosen career.[28]

[28]Even students who remain silent (*i.e.*, do not provide a statement of compliance, do not plead a valid defense, or do not apply for financial aid) may be incriminating themselves for failure to register on time. The fact that a student did not apply for financial aid after Section 1113 was enacted, but applied and received aid in prior years, may be a link used by enforcement officials searching for violations. Incomplete applications may also be a link. A student may reasonably believe that the Justice Department will use the fact that he did not apply for financial aid or submit a statement of compliance as evidence of knowing or intentional noncompliance in a subsequent trial. Therefore, students who remain silent, as well as students who mistakenly claim compliance and students who wish to contest denial of financial aid, incriminate themselves under the provisions of Section 1113. *See* J.S. App. at 25a.

Appellants may not use the threat of withholding educational benefits from one who needs them to coerce and compel the individual to forfeit his right against self-incrimination.

III. SECTION 1113 VIOLATES THE EQUAL PROTECTION GUARANTEE OF THE FIFTH AMENDMENT IN THAT IT DISCRIMINATES ON THE BASIS OF WEALTH.[29]

Although the district court did not reach the issue, appellees have urged throughout the pendancy of this case that Section 1113 violates the Fifth Amendment right to equal protection under the law because it discriminates on the basis of wealth.

The Section 1113 requirement of certifying compliance

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[29]Section 1113 may also impinge upon academic freedom guaranteed by the First Amendment which includes the right to selection of the student population by both the institution and the student. *Regents of the University of California v. Bakke*, 438 U.S. 265, 311-312 (1978) ("Academic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment. The freedom of a university to make its own judgments as to education includes the selection of its student body"). Section 1113 limits the pool of available students from which colleges and universities may select their student bodies on a basis unrelated to need, academic competence or other educationally relevant criteria. Admittedly, colleges and universities do adhere to certain generally applicable federal laws that burden their power, for example, civil rights laws which have a connection with the mission of academic institutions to provide educational opportunities. *Cf. Bob Jones University v. United States*, —U.S.—, 1035 S.Ct. 2017, 2035 n. 29 (1983). In contrast, Section 1113 has no connection with the purposes of academic institutions and represents instead an unconstitutional attempt to use only educational institutions to enforce an unrelated federal criminal statute inconsistent with their protected status under the First Amendment. Furthermore, as regulations require educational institutions to play primary and substantial roles in the process of enforcing Section 1113, 34 C.F.R. Part 668, that section will serve to chill the relationship between students and their academic institutions and the environment in which learning is pursued.

with draft registration obligations as a prerequisite to obtaining federal assistance for post-secondary education establishes an unnecessary burden and penalty on those who cannot afford to attend college without such assistance. The very purpose of the financial aid provisions of the Higher Education Act, 20 U.S.C. § 1070 *et seq.*, is to encourage attendance at colleges, universities and vocational schools by low and middle income students for the ultimate benefit of society. This Court also has recognized the critical role of education and its importance to society. *Plyler v. Doe*, 457 U.S. 202, 221 (1982).

During the Senate debate on the bill which resulted in enactment of Section 1113, Senator Durenberger recognized that Congress "would be punishing [the] middle class . . . more than we punish those who are wealthy enough to pay their own way through college, and more than those who do not attend college at all." 128 Cong. Rec. S4945 (May 12, 1982). *See also* 128 Cong. Rec. H4765 (July 28, 1982). Even the bill's sponsor in the House, Representative Solomon, recognized that "maybe we are discriminating against the poor." 128 Cong. Rec. H4767 (July 28, 1982).

While this Court has been reluctant to enunciate a specific standard of review for discrimination based on wealth equivalent to that applied to discrimination based on race, religion, or alienage (although wealth discrimination may have a strong adverse impact on such minority groups), a distinction based on wealth will be declared unconstitutional unless it is related to a rational legislative purpose and is not "invidious." *Dandridge v. Williams*, 397 U.S. 471, 483 (1970). This Court has "treated as *presumptively invidious* those classifications that . . . impinge upon the exercise of a 'fundamental right'." *Plyler*,

457 U.S. at 216-17 (emphasis added). While the Court has not elevated education to the status of "fundamental right," it has described education as a matter of "supreme importance."[30] In addition, it has acknowledged that "education has a fundamental role in maintaining the fabric of our society" and "a pivotal role . . . in sustaining our political and cultural heritage." *Id.* at 221. Thus, any action which impinges upon access to education without a rational legislative purpose should be deemed violative of the equal protection guarantee.[31]

There is no rational relationship between the enforcement of draft registration requirements of the Military

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[30]Recently, in *Bearden v. Georgia*, — U.S. —, 103 S. Ct. 2064, 2072 (1983), this Court struck down a law that unfairly burdened a "significant interest" without requiring the interest to be a "fundamental right," because there were alternative means to further the legislative purpose.

[31]In *Vlandis v. Kline*, 412 U.S. 441, 459 (1973), which concerned the issue of resident and non-resident college tuition, Justice White, in a concurring opinion, suggested the appropriate standard of review where there is discrimination in higher education.

> [I]t must now be obvious, or has been all along, that, as the Court's assessment of the weight and value of the individual interest escalates, the less likely it is that mere administrative convenience and avoidance of hearings or investigations will be sufficient to justify what otherwise would appear to be irrational discriminations.
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> *Here, it is enough for me that the interest involved is that of obtaining a higher education.* . . . It is plain enough that the State has only the most attenuated interest in terms of administrative convenience in maintaining this bizzare pattern of discrimination among those who must or must not pay a substantial tuition to the University. The discrimination imposed by the State is invidious and violates the Equal Protection Clause.

(Emphasis added.) Involved here, as in *Vlandis*, is the interest in obtaining a higher education which similarly outweighs the appellants' interest, if any, in maintaining Section 1113.

Selective Service Act and the purposes of the Higher Education Act. Section 1113 significantly burdens access of less wealthy nonregistrants to education and therefore amounts to invidious discrimination. Appellants argue that the purpose of Section 1113 is the "fair" allocation of scarce federal aid dollars. However, "a concern for the preservation of resources standing alone [cannot] justify [this] classification . . . ." *Id.* at 227.

Appellants already have the authority and the responsibility to prosecute nonregistrants. 50 U.S.C. App. § 462. Section 1113, adding a new provision to the "Offenses and Penalties" section of the Military Selective Service Act, creates a significant burden upon a class of students based upon lack of wealth which is both unnecessary and invidious.[22]

In addition to discriminating on the basis of wealth in access to higher education, Section 1113 unleashes a dual system of Selective Service law enforcement keyed to wealth. Wealthy young men are immune from its reach and are subject solely to the traditional criminal process. Economically vulnerable young men, however, are subject to both the criminal process and to the economic compulsion imposed by a loss of financial aid. While the Court has been

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[22]The operation of Section 1113 actually adds to wealth-based inequities in the Selective Service System which prior Administrations and Congress have historically sought to mitigate. *See* "In Pursuit of Equity: Who Serves When Not All Serve?", *Report of the National Advisory Commission on Selective Service* ("The Marshall Report") 37-51 (1967); Legislative History of Section 101(a) (20) of the Military Selective Service Act, Pub. L. No. 92-129 [codified at 50 U.S.C. App. § 454(i)], 117 Cong. Rec. S12280-81 (June 14, 1971); Comments of Representative Hartnett on Section 1113, 128 Cong. Rec. H4764 (July 28, 1982). For further historical perspective, *see* Anderson, *The Military Draft* (Hoover Press, 1982).

cautious in reviewing discriminations based on wealth, it has systematically refused to countenance dual criminal law enforcement systems keyed to wealth.[23] It would make a mockery of the concept of equality before the law to require scrupulous protection of the poor during the *adjudicative* process, while upholding devices like Section 1113 which single out the poor for special law enforcement attention without the pretense of a judicial trial.

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[23] *E.g.*, right to counsel, *Argersinger v. Hamlin*, 407 U.S. 25 (1972); *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Douglas v. California*, 372 U.S. 353 (1963); *Powell v. Alabama*, 287 U.S. 45 (1932); access to transcripts, *Roberts v. LaVallee*, 389 U.S. 40 (1967); *Lane v. Brown*, 372 U.S. 477 (1963); *Draper v. Washington*, 372 U.S. 487 (1963); filing fees, *Smith v. Bennett*, 365 U.S. 708 (1961); *Burns v. Ohio*, 360 U.S. 252 (1959); sentencing, *Tate v. Short*, 401 U.S. 395 (1971); *Williams v. Illinois*, 399 U.S. 235, 242 (1970) (period of imprisonment which varies on the basis of wealth constitutes "invidious discrimination").

CONCLUSION

For the reasons stated herein, the decision of the United States District Court for the District of Minnesota should be affirmed.

Respectfully submitted,

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